Supreme Court, U.S.
FILED

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No.

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In The

Supreme Court of the United States

October Term, 1993

KIM VERRICHIA and NAN SMOLOW,

Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE; BARTON FIELDS, Secretary of the Department of Revenue; JAMES SCHEINER, Secretary of the Department of Revenue; KARL M. ROSS, Department of Revenue, Deputy Secretary for Fiscal Policy and Analysis,

Respondents.

Petition for Writ of Certiorari to the Commonwealth Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED FOR REVIEW

Does the existence of an administrative remedy under state law preclude an action in state court under 42 U.S.C. §1983 to recover damages for the state's unlawful assessment and collection of excessive sales tax in violation of due process of law and equal protection of the law?

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The opinion of the Court of Common Pleas of Bucks County, Pennsylvania, is reported as follows: *Verrichia v. Commonwealth Department of Revenue,* 62 Bucks Co. L. Rep. 16 (1993). The opinion of the Commonwealth Court of Pennsylvania is reported as follows: *Verrichia v. Commonwealth, Department of Revenue,* __ Pa. Commw. __, 639 A.2d 957 (1994).

STATEMENT OF JURISDICTION

Jurisdiction for this petition is found at 28 U.S.C. § 1257 governing the issuance of a writ of certiorari to review the final decision by the highest court of a state in which a decision could be had.

The date of entry of the Order of the Commonwealth Court of Pennsylvania which is to be reviewed is March 24, 1994. (A. 20a). By Order dated May 12, 1994, the Commonwealth Court denied petitioners' timely request for reargument en banc. (A. 3a). By Order dated October 20, 1994, the Supreme Court of Pennsylvania denied petitioners' Petition for Allowance of Appeal. (A. 1a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision in question is the Supremacy Clause which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article VI, Clause 2.

The statute in question is 42 U.S.C. §1983 which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On May 16, 1988, petitioners Kim Verrichia and Nan Smolow filed this civil rights class action under 42 U.S.C. § 1983 in the Court of Common Pleas of Bucks County, Pennsylvania challenging respondents' imposition and collection of sales tax on manufacturers' rebates used to reduce the taxable purchase price of new automobiles. Petitioners alleged that the assessment and collection of sales tax on these rebates violated state law[1] and was arbitrary, capricious, confiscatory, discriminatory, unreasonable and without justification or authority, thereby depriving petitioners of due process of law and equal protection of the law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Respondents[2] filed preliminary objections to the complaint alleging that the trial court lacked jurisdiction because petitioners

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1. 72 P.S. § 7201(g)(1) and (2); Tax Regulation 300, 61 Pa. Code § 33.2.

2. Respondents are the Pennsylvania Department of Revenue; Barton Fields, Secretary of the Department of Revenue; James Scheiner, Secretary of the Department of Revenue; and Karl Ross, Deputy Secretary for Fiscal Policy and Analysis of the Department of Revenue. The individual defendants were sued in both their official and individual capacities.

had an adequate administrative remedy to obtain relief; the trial court denied these preliminary objections by order dated November 12, 1990. After the pleadings were closed, and even though the complaint specifically sought injunctive relief, respondents filed a motion for judgment on the pleadings on the grounds that, under *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), defendants were not "persons" liable for relief under § 1983. The trial court denied this motion by order dated April 1, 1991.

Prior to trial, petitioners filed a motion for leave to voluntarily discontinue[3] the case on the grounds that respondents had agreed to pay refunds to class members and that petitioners had obtained virtually all of the relief they originally requested; petitioners also sought counsel fees as prevailing parties under 42 U.S.C. § 1988 or under the common fund doctrine. Respondents opposed this motion and denied the existence of an agreement to pay refunds. After a lengthy evidentiary hearing, the trial court found, *inter alia*, that respondents had agreed to pay refunds, awarded counsel fees to petitioners, and approved the discontinuance of the action. (A.37a-45a).

Respondents appealed to the Commonwealth Court of Pennsylvania. On appeal, the Commonwealth Court held that petitioners had an adequate administrative remedy under state law which precluded the filing or maintenance of an action under 42 U.S.C. § 1983. (A. 14a). Although the Pennsylvania Supreme Court had recently held in *Murtagh v. County of Berks*, 535 Pa. 50, 634 A.2d 179 (1993) that taxpayers were not required to exhaust administrative remedies before filing a

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3. Since the trial court had previously certified the case as a class action, court approval was necessary to discontinue the case. Pa. R. C. P. No. 1714(a), 42 Pa. C. S.

§ 1983 action in state court, the Commonwealth Court determined that the decision in *Murtagh* — and hence the holding that exhaustion was not required — was limited to cases involving "de facto discrimination". (A. 13a-14a). Having found that petitioners did not have a § 1983 cause of action in state court, the Commonwealth Court concluded that the trial court's order certifying the plaintiff class was erroneous. (A. 18a). The Commonwealth Court reversed the order of the Court of Common Pleas of Bucks County permitting the voluntary discontinuance of this action and awarding counsel fees to petitioners.[4] *Id.*

Petitioners filed a timely petition for reargument en banc which was denied by order dated May 12, 1994.

Petitioners then filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. Petitioners requested the Pennsylvania Supreme Court to correct the Commonwealth Court's failure to follow *Murtagh* and vacate the holding that state administrative remedies must be exhausted. This petition for discretionary review was denied by order dated October 20, 1994. (A. 1a). Petitioners then filed this timely Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

This petition should be granted because the Commonwealth Court of Pennsylvania has decided an important federal question in a way that conflicts with the decisions of this Court; the Commonwealth Court has created an impermissible exhaustion

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4. Judge Pellegrini dissented in part from the Commonwealth Court's decision because he recognized that petitioners could maintain a cause of action under § 1983 without exhausting administrative remedies. (A. 21a).

requirement for actions in state court under 42 U.S.C. § 1983. *See* Rules of the Supreme Court of the United States, Rule 10.1(c).

The Commonwealth Court of Pennsylvania held that plaintiffs were precluded from "filing . . . or maintaining a § 1983 cause of action" because of the existence of an adequate administrative remedy and "that there was no valid § 1983 cause of action. ..." (A. 14a, 18a).

The Commonwealth Court's decision on this question of federal law, *i.e.* whether the existence of an administrative remedy precludes an action under § 1983 in state court, conflicts with the decisions and holdings of this Court in *Felder v. Casey,* 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), *Patsy v. Board of Regents of State of Florida,* 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982) and *Howlett v. Rose,* 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). Not only is the Commonwealth Court's decision wrong, it has the practical effect of eliminating the right to bring an action in Pennsylvania state court under § 1983 unless the claims involve "de facto" discrimination. Nothing in the plain language of § 1983, its legislative history, or the decisions of this Court support such an interpretation. Since the Pennsylvania Supreme Court refused to correct this erroneous decision, petitioners' only and last remedy is with this Court.

I.

EXHAUSTION OF REMEDIES IS NOT A PREREQUISITE TO A § 1983 ACTION IN STATE COURT.

In *Patsy, supra,* this Court clearly held that exhaustion of state administrative remedies was *not* a pre-requisite to a § 1983 action in federal court. 457 U.S. at 516, 102 S. Ct. at 2568.

In *Felder, supra,* this Court extended the holding in *Patsy* and ruled that a § 1983 action in state court[5] is likewise not subject to an exhaustion requirement. In *Felder,* the Court rejected the state's attempt to require compliance with a notice of claim statute before a § 1983 claim could be brought in state court; the Court held that the notice statute imposed an exhaustion requirement which was pre-empted by federal law and the Supremacy Clause when a § 1983 claim is brought in state court. 487 U.S. at 134, 138, 108 S. Ct. at 2305, 2307. The Court based its decision upon the recognition that an exhaustion requirement impermissibly burdens the exercise of a federal right which is "independent of any other legal or administrative relief that may be available as a matter of federal or state law". 487 U.S. at 148, 108 S. Ct. at 2312. *Cf. Monroe v. Pape,* 365 U.S. 167, 183, 81 S. Ct. 473, 482, 5 L. Ed. 2d 492 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). In addition, because there is no exhaustion requirement when a § 1983 claim is brought in federal court, *Patsy, supra,* the imposition of an exhaustion requirement for § 1983 claims in state court would result in differing decisions depending upon where the claim was brought; the Court squarely rejected the suggestion that the outcome of a § 1983 claim should depend upon whether the claim was brought in federal court or state court. 487 U.S. at 141, 153, 108 S. Ct. at 2308, 2314.[6] Thus, this Court in *Felder* concluded:

> A state law that conditions that right of recovery [under § 1983] upon compliance

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5. Federal and state courts have concurrent jurisdiction over § 1983 actions. *Howlett, supra,* 496 U.S. at 358, 110 S. Ct. at 2433.

6. In *Martinez v. California,* 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980), this Court held that a state cannot immunize an official from liability for injuries compensable under federal law.

> with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court.

487 U.S. at 153, 108 S. Ct. at 2314.

More recently, in *Howlett, supra,* this Court rejected a state's attempt to preclude § 1983 actions in state court because of sovereign immunity under state law. Noting that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action", the Court held that the state's refusal to entertain a claim under § 1983 violated the Supremacy Clause. 496 U.S. at 375, 378, 110 S. Ct. at 2442, 2444. The Court in *Howlett* expressly reaffirmed the principle that "the elements of, and the defenses to, a federal cause of action [under § 1983] are defined by federal law." 496 U.S. at 375, 110 S. Ct. at 2442. The Court in *Howlett* also reaffirmed the holding in *Felder* that exhaustion requirements for § 1983 actions in state court are preempted by federal law and the Supremacy Clause. *Howlett, supra,* 496 U.S. at 377, 110 S. Ct. at 2443.

The Commonwealth Court's decision clearly conflicts with the decisions in *Felder* and *Howlett.* These cases soundly reject the notion that a state can preclude or limit the "filing of or maintaining a § 1983 cause of action" based on the failure to

exhaust state administrative remedies. The elements of a cause of action under § 1983 are defined by federal law and not by state law. *Howlett, supra.* The Commonwealth Court has created an impermissible exhaustion requirement for § 1983 actions in Pennsylvania state court. This exhaustion doctrine requires petitioners to seek satisfaction in the first instance from the governmental defendants which Congress intended to subject to liability — the decision in *Felder* expressly rejected such a requirement. 487 U.S. at 142, 108 S. Ct. at 2308-09. Moreover, the proffered distinction that cases involving "de facto" discrimination are not subject to exhaustion has absolutely no foundation in the plain language of § 1983 or its legislative history, and creates a substantive distinction between different types of § 1983 claims which was rejected in *Felder.*[7]

In effect, this exhaustion requirement shields governmental defendants in Pennsylvania from liability under § 1983 by divesting the Court of Common Pleas of the authority to entertain damage claims under § 1983.[8] Not only does this decision

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7. In dicta, the Commonwealth Court stated that "because nowhere in the pleadings or record did taxpayers seek damages personally from [the individual defendants], we hold that the alleged personal-capacity actions were mere "pleading devices and not true personal-capacity causes of action." (A. 17a-18a). This statement had no basis in the record because petitioners had expressly sued the individual defendants in their personal capacity (Complaint, ¶¶ 3-4) and because of the posture in which the case was presented upon appeal (*i.e.*, the trial court having found prior to trial that respondents had agreed to pay refunds). Moreover, the Commonwealth Court relied principally upon a statement by petitioners' counsel — taken out of context — concerning the payment of counsel fees either as prevailing parties under 42 U.S.C. § 1983 or pursuant to the common fund doctrine.

8. In *Balshy v. Rank,* 507 Pa. 384, 490 A.2d 415 (1985) and *Fawber v. Cohen,* 516 Pa. 352, 532 A.2d 429 (1987), the Pennsylvania Supreme Court held that damage actions under § 1983 can *only* be brought in Common Pleas Court.

impermissibly burden the exercise of a federal right, it precludes the exercise of that right altogether in Pennsylvania state court.

CONCLUSION

The Commonwealth Court's decision has a far-reaching effect in Pennsylvania. Claims under § 1983 can no longer be brought in Pennsylvania state court absent proof of "de facto discrimination" or without exhausting administrative remedies. As this Court has recognized, Congress did not intend to allow states to impermissibly burden or preclude the filing of § 1983 actions in state court. The Commonwealth of Pennsylvania and its officials are not immune from federal law or this Court's decisions interpreting that law. It is therefore of utmost importance that the Court grant this petition and restore the supremacy of federal law in Pennsylvania and the ability to bring a § 1983 claim in Pennsylvania state court. This petition should be granted and the March 24, 1994 order of the Commonwealth Court of Pennsylvania should be summarily vacated and/or reversed in light of the Court's decisions in *Felder, supra,* and *Howlett, supra.*

Respectfully submitted,

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Date: January 13, 1995

APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING PETITION FOR ALLOWANCE OF APPEAL FILED OCTOBER 21, 1994

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 488 E.D. Alloc. Dkt. 1994

KIM VERRICHIA and NAN SMOLOW,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE and BARTON FIELDS, Secretary of the Department of Revenue, and KARL ROSS, Dept. of Revenue Deputy Secretary for Fiscal Policy and Analysis,

Respondents

Petition for Allowance of Appeal from Order of the Commonwealth Court

ORDER

PER CURIAM

AND NOW, this 20th day of October, 1994, the Petition for Allowance of Appeal is denied.

Mr. Justice Montemuro is sitting by designation.

Appendix A

TRUE COPY FROM THE RECORD
Attest: 10/21/94

s/ Patricia Johnson
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania
Eastern District

APPENDIX B — ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA FILED MAY 12, 1994

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 381 C. D. 1993

KIM VERRICHIA and NAN SMOLO

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE et al.,

Appellants

ORDER

NOW, May 12, 1994, having considered appellees' application for reargument and appellants' answer, the application is denied.

BY THE COURT:

s/ David W. Craig
P.J.

APPENDIX C — OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA FILED MARCH 24, 1994

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 381 C.D. 1993
ARGUED: January 31, 1994

KIM VERRICHIA and NAN SMOLOW

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE and BARTON FIELDS, Secretary of the Department of Revenue, and JAMES SCHEINER, Secretary of the Department of Revenue and KARL ROSS, Department of the Revenue Deputy Secretary for Fiscal Policy and Analysis,

Appellants

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE EMIL E. NARICK, Senior Judge

OPINION BY
SENIOR JUDGE NARICK FILED: March 24, 1994

Commonwealth of Pennsylvania, Department of Revenue (Department), Barton Fields, a former Secretary of the Department, James Scheiner, a former Secretary of the Department and Karl Ross, former Deputy Secretary for Fiscal Policy Analysis for the Department (collectively, Commonwealth), appeal from the orders of the Court of Common Pleas of Bucks County that granted Nan Smolow, Kim Verrichia and class representative taxpayers' (collectively, Taxpayers)

motion for voluntary discontinuance of the class action filed by Taxpayers and Taxpayers their attorneys' fees, costs and expenses. We reverse.

FACTS

On May 16, 1988, Taxpayers filed a civil rights action, pursuant to 42 U.S.C. § 1983,[1] challenging a Department policy regarding sales tax on automobile rebates received by a consumer when purchasing a new motor vehicle.[2] However, three weeks before the filing of this class action suit, on April 28, 1988, then Deputy Secretary Ross issued a letter to the Pennsylvania Automotive Association (PAA) as a result of PAA's request for clarification of the Department's auto rebate taxation policy. The need for clarification resulted from differing types of rebates.[3] A problem existed with using the term "rebate" to include both

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1. Section 1983 provides in pertinent part:

> Every person, who under color of statute, ordinance, regulation, custom, or usage, of any state, . . . , subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and law shall be liable to the party injured in an action at law. . . .

2. Taxpayers had written the Department in 1987, stating that the Department's policy was improper.

3. For example, some rebates are applied up-front to the purchase price to effect a purchase discount. When the rebate is used as a cash bonus, it is not taxable. On the other hand, when the rebate money is given to the purchaser after the sale, it affects neither the purchase price nor the amount of sales tax.

purchase discounts and true rebates, i.e. cash refunds. The Department determined that since purchasers were assigning their rebates to the dealer in increasing numbers with the practical effect of lowering the price they paid for the vehicle, the rebate amount could be subtracted from the purchase price, thus lowering the amount of Pennsylvania sales tax for the transaction, provided that the rebate was assigned at the time of sale. This revision did not affect the amount of sales tax due on the purchase of a new vehicle where the manufacturer mailed rebates to the purchaser following the sale. Similarly, this revision did not change the amount of sales tax due for a vehicle transaction involving dealer discounts or rebates.

Moreover, the revision did not change the fact that, in reality, a manufacturer's rebate cannot be given before or at the time of sale. Rather, it still can only be issued after the sale. It is the pre-April 28, 1988 policy of the Department that Taxpayers' complaint challenges.[4]

Taxpayers' complaint asserts that Sections 201(g)(1) and (2) of the Tax Reform Code of 1971 (Tax Code), Act of March 4, 1971, P.L. 6, *as amended,* 72 P.S. §§ 7201(g)(1) and (2), and the Pennsylvania Department of Revenue Regulation at 61 Pa. Code § 33.2 (Regulation 300), provide that discounts such as on-the-spot cash discounts, wholesaler's discounts and trade discounts — the type of transaction that was affected by the Department's April 28, 1988 revision — which effectively establish a new sales price and which do not occur after the sale, should be deducted in computing the purchase price when determining the amount of

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4. Following the April 28, 1988 clarification letter and subsequent press release, the Department's Board of Appeals (Board) began receiving petitions for refunds of sales tax paid on rebates received at or before the time of the sale although the Commonwealth did continue to receive some sales tax on rebates until July 1988, after the lawsuit was filed.

sales tax. Taxpayers' complaint further asserts that pursuant to Section 202(a) of the Tax Code, 72 P.S. § 7202(a), Pennsylvania's six percent sales tax was erroneously calculated on the full purchase price of all new motor vehicles, before deducting the discounts. Taxpayers assert that contrary to the Tax Code and Regulation 300 the Commonwealth, acting under color of state law, maintained the custom, policy and practice of collecting a six percent sales tax on the discounted portion of the purchase price of a new motor vehicle. Taxpayers contend this action was "arbitrary, capricious, confiscatory, discriminatory, unreasonable and wholly without justification or authority, thereby depriving [Taxpayers] of their property without due process and in violation of the Fifth and Fourteenth Amendments to the United States Constitution. . . ." (8a-9a).

Taxpayers' complaint also contends that a class action is the proper manner to proceed in this cause of action because: (1) the class is so numerous that joinder of all members would be impractical; (2) common questions of law and fact exist as to each member of the class; (3) representative Taxpayers' claims are typical of the claims of all other class members; (4) the class is manageable; (5) individual suits by individual class members would result in varying and inconsistent adjudications; and (6) the expense of litigation favors a single class action instead of individual or separate actions.

Shortly after this lawsuit was filed, the Commonwealth requested that the action be stayed pending the disposition of other actions filed by Verrichia and Smolow.[5] Despite this stay,

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5. In *Smolow v. Commonwealth*, 119 Pa. Commonwealth Ct. 324, 547 A.2d 478 (1988), *aff'd per curiam*, 521 Pa. 534, 557 A.2d 1063 (1989) (*Smolow I*), Smolow filed a petition for review and for class certification in our original jurisdiction. The petition sought refunds, injunctive relief and/or a writ of

(Cont'd)

the Commonwealth began issuing refunds of improperly collected sales tax beginning in July 1988 through October 1989. On April 20, 1990, the stay of this action was vacated because of the final disposition in *Smolow I* and *Smolow II*. The Commonwealth filed preliminary objections which the trial court denied without opinion on November 12, 1990. The Commonwealth, after answering the complaint, then moved for judgment on the pleadings, on the basis that an action brought pursuant to 42 U.S.C. § 1983 against state officials which seeks payment of monies from the state treasury is barred by *Will v. Michigan,* 491 U.S. 58 (1989). On April 1, 1991, the trial court denied the motion for judgment on the pleadings, again without opinion.

On June 17, 1991, the trial court conducted a class certification hearing and entered an order certifying the class

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(Cont'd)
mandamus restraining the Department and treble damages under the Unfair Trade Practices and Consumer Protection Law, Act of December 17, 1968, P.L. 1224, *as amended,* 73 P.S. §§ 201-1-201.9.2. We held that Smolow had failed to exhaust her administrative remedies and thus, because the action was not maintainable in our original jurisdiction, it could not proceed as a class action. The Supreme Court affirmed, *per curiam.*

Smolow v. Commonwealth, 131 Pa. Commonwealth Ct. 276, 570 A.2d 112 (1990) *aff'd per curiam,* 527 Pa. 371, 592 A.2d 40 (1991) (*Smolow II*), concerned a class action Smolow filed with the Board to collect the overpaid sales tax. The Board granted Smolow's individual claim, but denied the request for class certification. The Board of Finance and Revenue reached the identical result. Smolow appealed to this Court. We also denied class certification, holding the right to sue for refund of taxes erroneously paid was a personal right of the individual grieved which could not be maintained as a class action. We specifically held that there must be a substantive cause of action which permits the procedure of a class action to be used. "Only if there is such a cause of action may a class be certified." *Id.* at 296, 570 A.2d at 122. The Supreme Court affirmed, *per curiam.*

which, on September 26, 1991, was amended to include only the period from May 16, 1986 forward. The class certification order also provided for notice to almost two million members of the class as defined.[6] Enclosed in all motor vehicles owners license renewal packets was the notice stipulated to by the parties which provided:

NOTICE OF CLASS ACTION
CERTIFICATION

> A class action lawsuit was filed on May 16, 1988 in the Court of Common Pleas of Bucks County (*Verrichia, et al. v. Commonwealth, et al.*, No. 88-3983-17-5) alleging that the Pennsylvania Department of Revenue and its officials wrongfully collected sales tax on the purchase price of new motor vehicles before deducting the amount of manufacturers' rebates or discounts received at the time of sale. Plaintiffs allege that this violated their constitutional rights and the rights of all other persons who were similarly affected.
>
> Plaintiffs seek damages for all persons in the class for the excess amount of sales tax paid,

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6. Taxpayers assert that the Commonwealth is barred in the instant case from challenging the class certification because it did not appeal from the order defining the class and approving the class notice. This assertion is meritless. An order denying class certification is a final appealable order, *Bell v. Beneficial Consumer Discount Co.*, 465 Pa. 225, 348 A.2d 734 (1975), but an order granting a class certification is not a final appealable order because the order neither disposes of the entire case nor puts the appellant out of court because of the claim. *See, e.g., Pugar v. Greco*, 483 Pa. 68, 394 A.2d 542 (1978). Thus, the Commonwealth could not have appealed from this order.

i.e. 6% of the rebate or discount plus interest.

Sales tax on new motor vehicles is now collected based on the purchase price after deduction of rebates or discounts received at or before the sale. ***Refunds will be issued to persons who submit a signed written request with proof of overpayment pursuant to the law.***

The Class. On June 17, 1991 the court certified the following class:

All persons who purchased a new motor vehicle subject to the Pennsylvania sales tax on or after May 16, 1986 who received or who were credited with a manufacturer's discount or rebate at or before the time of sale, where Pennsylvania collected a sales tax calculated on the purchase price before deducting such rebate or discount.

Decision Binding on the Class. If you are a member of this class, you will be bound by the court's determination in this case unless you file a written notice with the Prothonotary of Bucks County, Bucks County Court House, Doylestown, PA. 18901 no later than March 31, 1993 that you want to be excluded from the class.

Claims for Tax Refunds. You may identify yourself as a member of this class and you may apply for a tax refund by submitting a

> claim to the Department of Revenue with the following: (a) name and address of purchaser; (b) a copy of the original invoice showing the purchase priced and the amount of the rebate; (c) proof of payment of sales tax; and (d) this claim card signed by yourself and including your social security number. Send the claim to the PA Department of Revenue, Board of Appeals, Department 281021, Strawberry Square, Harrisburg, PA 17128.
>
> Only those persons submitting the required information will be eligible for a refund. No refunds will be issued until final disposition of the action and order of the court.
>
> *Claim Submission Deadline.* Claims must be postmarked no later than March 31, 1993.

(Emphasis added).

On March 7, 1992, Taxpayers filed a motion for voluntary discontinuance pursuant to Pa. R.C.P. No. 1714, contending that the class notice to which the Commonwealth stipulated effectively resolved all issues of liability based upon the language in the notice that, "Refunds will be issued to persons who submit a signed written request with proof of overpayment pursuant to the law." Taxpayers also petitioned for attorneys' fees, costs and expenses under Pa. R.C.P. No. 1716.

The trial court heard conflicting testimony from the parties concerning whether or not the Commonwealth had admitted liability by stipulating to the language of the Notice of Class Certification. The trial court held that the Commonwealth had

conceded liability in stipulating to the Notice. The trial court further found that only after the filing of Taxpayers' cause of action and as a result of the efforts of representative Taxpayers did the Commonwealth stop taxing manufacturer's rebates and agree to pay the cash refunds to class members who submitted proof of overpayment. The trial court established a common fund for refunds totaling approximately $31.5 million.

The trial court also determined that as prevailing parties, Taxpayers were entitled to attorneys' fees in the amount of $701,880 plus costs of $70,088.07 from the common fund "generated by the efforts of their counsel" or, alternatively, pursuant to 42 U.S.C. § 1988. The Commonwealth now appeals.[7]

The Commonwealth argues that the trial court erred as a matter of law in: 1) allowing Taxpayers to maintain this action because Taxpayers failed to exhaust administrative remedies; 2) failing to apply the doctrine of *Will v. Michigan*; 3) certifying this action as a class action; and 4) awarding attorneys' fees and costs to Taxpayers' counsel.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

The Commonwealth cites considerable case law to support its proposition that no claim can be maintained for deprivation of property without due process, i.e., a § 1983 action, if a plain and adequate administrative remedy exists to recover the property. The Commonwealth asserts that because the individual taxpayers had opportunity to recover the overpayment of the sales tax as

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7. Our scope of review is limited to a determination of whether the trial court committed an error of law or abused its discretion *Mirror Printing Co. v. Altoona Area School Board*, 148 Pa. Commonwealth Ct. 168, 609 A.2d 917 (1992).

individuals, as did Smolow, Verrichia and over 12,000 others, with rights of appeal,[8] that a plain and adequate remedy for relief exists through the administrative process and the judiciary.[9] The Commonwealth now argues that having had the opportunity to seek recovery of the tax, Taxpayers may not maintain the § 1983 action, and, therefore, the trial court erred in failing to grant the Commonwealth's preliminary objections and motion for judgment on the pleadings and in eventually certifying the class.

While in *Smolow I,* this Court, affirmed by the Supreme Court, required the exhaustion of administrative remedies, the Supreme Court in *Murtagh v. County of Berks,* __ Pa. __, 634 A.2d 179 (1993), did not require the taxpayer to exhaust administrative remedies before filing a § 1983 action. *Smolow I* and *Murtagh* appear conflicting, but upon careful analysis *Smolow I* and *Murtagh* can be reconciled.

In *Murtagh,* the taxpayers, representing a class of recent purchasers of real estate who had not exhausted their

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8. See discussion of *Smolow II* at n.1.

9. The Tax Code permits a taxpayer to petition the Board within three years of the payment of the tax. Section 253(a) of the Tax Code, 72 P.S. § 7253(a). An unsatisfied taxpayer may then appeal to the Board of Finance and Revenue. Section 254 of the Tax Code, 72 P.S. § 7254. Thereafter, an aggrieved individual has the right of *de novo* review to this Court, Section 255 of the Tax Code, 72 P.S. § 7255, with an appeal as of right to the Pennsylvania Supreme Court. Pa. R.A.P. 1101(a)(2). This is the procedure Taxpayers followed in *Smolow II.* Smolow was granted a refund claim, but denied the request for class certification. On *de novo* review to this Court, we held that while the Commonwealth could not defeat a class certification by proffering an individual refund to Smolow, the right to sue for refund of taxes erroneously paid was a personal right of the individual aggrieved and could not be maintained as a class action. The Supreme Court affirmed.

administrative remedies, filed an amended complaint against various local governments. The taxpayers asserted that the local governments had adopted a discriminatory "Welcome Stranger" policy in reassessing only the newly acquired real estate, thus violating their equal protection rights under the Fourteenth Amendment. The taxpayers also asserted that because the reassessments were done under color of state law, the local government violated 42 U.S.C. § 1983. The trial court held it had jurisdiction but we reversed, holding that the taxpayers failed to exhaust their administrative remedies, and thus, the trial court did not have jurisdiction. The Supreme Court reversed and remanded, holding that the taxpayers were not required to exhaust their administrative remedies before instituting their § 1983 action because the "Welcome Stranger" policy was *de facto* discriminatory. However, the Tax Code and Regulation 300, applicable here, and also at issue in *Smolow I* and *Smolow II,* were *not de facto* discriminatory because the law applied uniformly to all purchasers of automobiles that received rebates.[10] Thus, *Murtagh* does not control, because the Tax Code and Regulation 300 at issue here are not *de facto* discriminatory. Therefore, we hold that Taxpayers had an adequate administrative remedy as stated in *Smolow I,* which precludes their filing of or maintaining a § 1983 cause of action.

DOCTRINE OF WILL v. MICHIGAN

Although we could end our discussion at this point, we feel obliged to discuss the Commonwealth's most persuasive argument, that the trial court erred in failing to apply the doctrine of *Will v. Michigan.* In *Will v. Michigan,* an employee filed a claim

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10. *See Transcontinental Gas Line Corp. v. Commonwealth,* 153 Pa. Commonwealth Ct. 60, 620 A.2d 614 (1993).

against the Michigan Department of State Police and the Michigan Director of State Police in his official capacity, alleging that both parties had denied the employee a promotion for an improper reason in violation of 42 U.S.C. § 1983. The Circuit Court dismissed the employee's action and the Supreme Court affirmed. Reaffirming what it held in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that a state is not a "person" within the meaning of § 1983. The Supreme Court, however, also held that state officials acting in their *official* capacity are also not "persons" under § 1983 because "a suit against a state official in his or her official capacity is not a suit against the official but rather a suit against the official's office." *Id.* at 71.[11]

In *Hafer v. Melo*, 502 U.S. __, 116 L. Ed. 2d 301 (1991), the Supreme Court further developed *Will's* holding and allowed a state official in his *personal* capacity to be sued in a § 1983 action. In *Hafer*, employees filed a § 1983 action against Hafer, Pennsylvania's Auditor General, seeking money damages against Hafer in her personal capacity. The district court dismissed the employees' action under *Will*, but the Third Circuit reversed on this issue. The Third Circuit held that while Hafer's power to hire and fire derived from her position, a suit for damages based on the exercise of this authority could be brought against Hafer in her personal capacity. The Supreme Court affirmed.

In an attempt to eliminate the confusion about the distinction between personal-capacity and official-capacity suits, the Supreme Court in *Hafer* described official-capacity suits as

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11. *Will* also held, however, that a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as an action against the state. *Will*, 491 U.S. at 71, n. 10 (citation omitted).

another way of pleading an action against the governmental unit of which the officer is an agent of that unit. Thus, the official-capacity suit is treated as a suit against the state. In these situations when an official sued in this capacity dies or leaves office, the successor automatically assumes the role in the litigation. Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, "the entity's 'policy or custom' must have played a part in the violation of federal law." *Id.* at __, 116 L. Ed. 2d at 309, citing *Kentucky v. Graham,* 473 U.S 159, 166 (1985) (citation omitted). Therefore, in an official-capacity suit the only immunities available to the agent are those immunities available to the governmental unit. *Id.*

Personal-capacity suits differ in that they seek to impose individual liability upon the official for actions taken under "color of state law." *Id.* Thus, in personal-capacity suits one must show that the official was acting under "color of state law" when the deprivation of a federal right occurred. The plaintiff in a personal-capacity suit need not establish a connection to governmental "policy or custom," but then officials, sued in this personal capacity, may assert the personal immunity defenses such as reasonable reliance on the existing statute and regulation. *Id.* However, the plaintiff may not merely plead against the official as an individual, the plaintiff must also seek damages against the individual.

In *Scheuer v. Rhodes,* 416 U.S. 232 (1974), the estates of three students who died at Kent State University in May 1970 sought damages from the governor of Ohio and other state officials in the federal district court. The district court dismissed the complaints on the theory that although brought against state officials in their personal capacities they were in substance actions against the state and, therefore, barred by the Eleventh

Amendment.[12] The Supreme Court, citing *Ex parte Young*, 209 U.S. 123 (1908), rejected this view, stating that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Scheuer* also held that the doctrine of *Ex parte Young* does not apply where a plaintiff seeks damages from the public treasury. That is, where the action is one against the public treasure, it is in reality against the state and the Eleventh Amendment would bar the action in federal court.

In the case before us, Taxpayers made individual claims against two secretaries of the Department and a deputy secretary. The initial action was brought only against Secretary Fields, but his successor, Secretary Scheiner, was later added. Further, Taxpayers present no evidence that they sought damages from the officials as individuals. Taxpayers sought only damages from the coffers of the Commonwealth. In fact, Smolow's counsel stated that he was requesting "to be paid by the *Commonwealth* out of this so-called $31,000,000 common fund." (376a) (Emphasis added).

As was stated in *Will*, a personal-capacity suit is more than a "mere pleading device." Therefore, because Taxpayers' action followed successive secretaries of the Department and because nowhere in the pleadings or record did Taxpayers seek damages personally from Defendants Fields, Scheiner or Ross, we hold that the alleged personal-capacity actions were mere pleading

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12. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

devices and not true personal-capacity causes of action. Our holding is compelled by the holdings in the decisions of the United States Supreme Court. Because no § 1983 action can be brought against the state or a state official in his official capacity, *Will,* and that no true cause of action was brought against the state officials defendants in this case in their personal capacity, Taxpayers had no § 1983 cause of action, *ab initio.*

Because we must examine whether a cause of action exists before granting a class action, *Lillian v. Commonwealth,* 467 Pa. 15, 354 A.2d 250 (1976), *Stevenson v. Department of Revenue,* 489 Pa. 1, 413 A.2d 667 (1980) and *Smolow I,* and because we hold that there was no valid § 1983 cause of action here, the trial court erred in certifying the class.[13]

Accordingly, we reverse.[14]

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13. We are concerned that the initial certification of the class by the trial court may have misled some individuals who were improperly taxed to forego filing a petition for refund of taxes within the three-year statute of limitation set forth in 72 P.S. § 7253(a). Although we now reverse the trial court's grant of class certification, we believe that the trial court's order granting certification does equitably toll the running of the statute of limitations. The Commonwealth thus should process the forms submitted by Taxpayers under the Notice of Class Certification as if they were timely petitions for refund of taxes improperly paid. *See generally American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974).

14. Because of our disposition in this case, we need not address the Commonwealth's challenge to the trial court's certification of the class based upon the allegation that the Comonwealth conceded liability in stipulating to the Notice of Class Certification. We also need not address the challenge to the trial court's granting of attorneys' fees and costs to Smolow's counsel because counsel was not successful in either securing a class which allows fees pursuant to Pa. R.C.P. No. 1716 or in stating a cause of action under 42 U.S.C. § 1983 which allows attorneys' fees under 42 U.S.C. § 1988. *See Pediner, Dortman, Wolffe, Rounick & Cabot v. Insurance Department,* 46 Pa. Commonwealth Ct. 641, 407 A.2d 100 (1979).

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s/ Emil E. Narick, J.
EMIL E. NARICK, Senior Judge

Appendix C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 381 C.D. 1993

KIM VERRICHIA and NAN SMOLOW

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE and BARTON FIELDS, Secretary of the Department of Revenue, and JAMES SCHEINER, Secretary of the Department of Revenue and KARL ROSS, Department of the Revenue Deputy Secretary for Fiscal Policy and Analysis,

Appellants

ORDER

AND NOW, this 24th day of March, 1994, the order of the Court of Common Pleas of Bucks County in the above-captioned matter is hereby reversed.

s/ Emil E. Narick, J
EMIL E. NARICK, Senior Judge

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 381 C.D. 1993
ARGUED: January 31, 1994

KIM VERRICHIA and NAN SMOLOW

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE and BARTON FIELDS, Secretary of the Department of Revenue, and JAMES SCHEINER, Secretary of the Department of Revenue and KARL ROSS, Department of the Revenue Deputy Secretary for Fiscal Policy and Analysis,

Appellants

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE EMIL E. NARICK, Senior Judge

CONCURRING OPINION BY JUDGE PELLEGRINI
FILED: March 24, 1994

I concur with the majority's reversal of the trial court's order awarding counsel fees, but do not join because I disagree with the reasoning used in arriving at its holding. The majority reverses the trial court's award of counsel fees for two reasons: Taxpayers have failed to exhaust their state administrative remedies and a Section 1983 action against the Commonwealth and its officials is barred by the Eleventh Amendment. I disagree that there is a requirement for exhaustion of administrative remedies, as well as Taxpayers' action is totally barred by the Eleventh Amendment. I would, however, reverse the award of counsel fees because I do not believe Taxpayers have prevailed on any significant issue.

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On May 16, 1988, Taxpayers brought a class action civil rights action pursuant to 42 U.S.C. §1983 challenging a Pennsylvania Department of Revenue (Department) policy regarding sales tax on auto rebates received by a consumer when purchasing a new motor vehicle. They sought both an injunction of the Department's tax rebate policy, as well as a refund of all sales tax calculated on the rebate amount. The action arose because sales tax was paid on the entire purchase price, apparently as a result of a 1987 letter ruling of a Department of Revenue Attorney, finding that the calculation of sales tax against an automobile's purchase price should not be reduced by the amount of any manufacturer's rebate.[1] Responding to a request for clarification of the Department's rebate policy from the Pennsylvania Automotive Association (PAA), in a letter dated April 28, 1988, *three weeks before this lawsuit was filed,* a Deputy Secretary of the Department stated that the Department would allow the rebate amount to be subtracted from the purchase price.[2]

After its preliminary objections to the complaint were denied, the Commonwealth filed an answer and new matter contending, among other things, that the policy sought to be enjoined had already been changed. The Commonwealth filed for judgment on the pleading that the trial court also denied. Taxpayers then filed for class certification of the action which was granted by the trial court. After certification, the parties

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1. This letter finding was that a manufacturer's rebate was not available to a purchaser until the sale is actually consummated. Because it was not available until after the sale, the amount could not be used to reduce the purchase price.

2. This clarification of policy was sent to the PAA and the Pennsylvania Department of Transportation (PennDot), the agency that collects sales tax on automobile purchases. Press releases were also issued concerning the clarification.

agreed to class notice and the notification process by mailing the notices to almost 2 million individuals. Notice was accomplished by placing the notices in the PennDot renewal packet. Taxpayers then filed a petition for voluntary discontinuance and a petition for attorney's fees and costs contending that because the class had been certified and notice given, and the Commonwealth had agreed to pay all class members' claims if filed, they had obtained the full relief for the class and, consequently, were entitled to attorney's fees under 42 U.S.C. §1988.[3] The trial court granted discontinuance of the class action, ordered the Commonwealth to pay all approximate class members' refunds if filed, and to pay Taxpayers $771,176.14 in attorney's fees and costs. After the Commonwealth's post trial motions were denied, this appeal followed.

I.

One of the bases on which the majority reverses the trial court is its holding that Taxpayers had to exhaust the administrative procedures provided for in the Tax Code before bringing a Section 1983 action. Recognizing that the Supreme Court, in *Murtagh v. County of Berks*, ___ Pa. ___, 634 A.2d 179 (1993), did not require Taxpayers to exhaust their administrative remedies before filing a Section 1983 action, the majority finds that because *Murtagh* involved a claim of invidious discrimination, and here, no discrimination is alleged, that distinction takes this case out of *Murtagh's* ambit. As such,

3. Section 1988 provides in pertinent part:

> [I]n any action or proceeding to enforce a provision of [Section 1983 and other statutes] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

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Taxpayers are still required to exhaust their administrative remedies before maintaining a Section 1983 action. I disagree with the majority's holding because *Murtagh* did not attempt to address the necessity of exhaustion of administrative remedies, but rather, the applicability of the Tax Injunction Act of 1937, 28 U.S.C. §1341, to a Section 1983 action brought in state courts.

Murtagh involved a class of taxpayers challenging the real estate tax assessment procedures of the Berks County Board of Assessment through a Section 1983 action. At issue was the applicability of the Tax Injunction Act to Section 1983 actions brought in state courts. Because the jurisdiction of federal courts for federal statutory violations are set by Congress, Congress, in acts such as the Tax Injunction Act, can foreclose jurisdiction of district courts over certain causes of action. When enacting the Tax Injunction Act, Congress provided that:

> The district courts shall not *enjoin, suspend or restrain* the assessment, levy or collection of *any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.* (Emphasis added).

While the Tax Injunction Act only bars injunctive action, the Supreme Court in *Fair Assessment in Real Estate Association, Inc. v. McNary,* 454 U.S. 100 (1981), found that the principle of comity bars actions for monetary damages as well.

The United States Supreme Court stated that when Congress enacted the Tax Injunction Act, it recognized that the autonomy and fiscal stability of states survive best when their tax systems are not subject to federal scrutiny. The Supreme Court reasoned that allowing actions for monetary damages would be just as

intrusive and disruptive to the state's revenue collection system as the actions for injunctive relief specifically barred under the Tax Injunction Act, and monetary damages should also not be available. The court then went on to state that "[s]uch taxpayers must seek protection of their federal rights by *state remedies,* provided, of course, that those remedies are *plain, adequate and complete,* and may ultimately seek review of the state decisions in this court." *Id.* at 116. (Emphasis added).

Reversing this court and not disagreeing that state remedies to challenge unlawful assessments were adequate and complete, our Supreme Court held that the statutory abstention of the Tax Injunction Act did not foreclose state courts from hearing Section 1983 actions. It held that while Congress did not want federal courts to intrude in state tax procedures by entertaining challenges based on federal causes of action, that rationale did not apply by the Act's very terms. The Tax Injunction Act only applied to federal district courts, and the principle of comity embodied in that Act and Supreme Court decisions expanding it did not apply when the state courts were doing the intruding. While Taxpayers in this action could not maintain this cause of action in federal court as a result of *Murtagh,* nothing forecloses them from maintaining their Section 1983 action in state courts. As can be seen from the foregoing issue, *Murtagh* has nothing to do with exhaustion of administrative remedies, but whether an action foreclosed in federal courts based on comity is also barred in state courts.

This leads to the crux of my disagreement with the majority: its holding that the plaintiffs need to exhaust administrative remedies prior to bringing this action. In *Howlett v. Rose,* 496 U.S. 356, 110 S.Ct. 2430 (1990), the Supreme Court held that state courts are mandated to hear Section 1983 actions explaining

that "federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the states as laws passed by the state legislature." *Id.*, 110 S.Ct. at 2438. It went on to say that because it is a federal right, "a state may not, by statute or common law, create a cause of action under Section 1983 . . ." nor may a state lessen the availability of a Section 1983 action. *Id.*, 110 S.Ct. at 2439, 2442. By holding that Taxpayers must exhaust their administrative remedies, I believe that the majority is diminishing the availability of a federal cause of action directly contrary to *Howlett.*

From the resurrection of Section 1983 in *Monroe v. Pape,* 365 U.S. 167 (1961), the Supreme Court has rejected the requirement that before filing a Section 1983 cause of action, even state *judicial* remedies must be exhausted. In *Monroe,* it stated "[t]hat this court has not interpreted Section 1983 to require a litigant to pursue state judicial remedies prior to commencing an action under this section." Extending that holding, in *Patsy v. Board of Regents of the State of Florida,* 457 U.S. 496 (1982), the Supreme Court has also found that a plaintiff need not exhaust his or her *administrative* remedies in order to maintain a Section 1983 cause of action because Congress intended that aggrieved parties have ready access to the forum of their choice. *See also Felder v. Casey,* 487 U.S. 131 (1988). Because the Supreme Court has expressly held that there is no need to exhaust state administrative remedies, I disagree with the majority that Taxpayers could not maintain their Section 1983 action because they failed to exhaust their administrative remedies.

II.

The other basis on which the majority relies to reverse the trial court's decision is that a Section 1983 action against the

Commonwealth and its officials acting in an official capacity is not maintainable because of the Supreme Court's decision in *Will v. Michigan Department of State Police,* 491 U.S. 58 (1989). *Will* greatly limited the viability of maintaining Section 1983 actions against states and its officials. Prior to *Will,* Section 1983 actions against states were dismissed under the Eleventh Amendment to the United States Constitution which generally prohibits suits against a state or its agencies. *See, e.g., Kentucky v. Graham,* 473 U.S. 159 (1985). Because it does not immunize states from suits in state courts, *Maine v. Thiboutot,* 448 U.S. 1 (1980), and a state could waive its immunity, *Port Auth. Trans-Hudson Corp. v. Feeney,* 495 U.S. 299 (1990), the Eleventh Amendment acts only as a partial bar to the bringing of a Section 1983 action against them. *Will* affords states a much greater protection than that afforded by the Eleventh Amendment from a Section 1983 suit by holding that states are not "persons" as used in the section. Because they are not "persons", they do not fall within the section's ambit and cannot be sued in state courts nor can the state waive immunity. However, *Will's* bar to maintaining a Section 1983 action against public officials when acting in their official capacity is not total.[4]

As the majority itself recognizes, while the state continues to be immune from suit, state officials still can be sued under Section 1983 in their official capacity for prospective injunctive relief. *See Will,* 491 U.S. at 71 n.10. "[O]f course, a state official sued in his or her official capacity for injunctive relief would be a person under Section 1983 because 'official capacity actions for

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4. Of course, public officials can be sued when acting in their personal capacity if the actions complained of were outside those which the public official usually administered, e.g., firing persons for political reasons, they were "persons" within the Act and public officials could be sued in their individual capacity. *Hafer v. Melo,* ___ U.S. ___, 112 S.Ct. 358 (1991).

prospective relief are not treated as actions against the State' ". *Edelman v. Jordan*, 415 U.S. 651 (1974).

Because a Section 1983 action cannot be maintained to obtain any judgment that would require reimbursement of funds from the state treasury, I agree with the majority and find that portion Taxpayers' action requiring the Commonwealth to pay all appropriate refunds cannot be maintained. However, because the Section 1983 action can be maintained seeking prospective injunctive relief, I believe that portion of the action against state officials was maintainable. Because it was maintainable, we are required to determine whether Taxpayers are prevailing parties within the meaning of Section 1988.

III.

While the previous analysis of exhaustion of administrative remedies and the effect of *Will* on Taxpayers' claim was necessary, that analysis is only relevant in the way it aids in determining whether Taxpayers are entitled to counsel fees. Specifically, the issue before us is whether Taxpayers are prevailing parties within the meaning of Section 1983, when Taxpayers' voluntarily discontinued their action. In *Hewitt v. Helms*, 482 U.S. 755 (1987), the Supreme Court held that a plaintiff to be entitled to counsel fees must show that the litigation was the direct cause of the changes made by the public officials. *See also Farrar v. Hobby*, ___ U.S. ___, 113 S.Ct. 566 (1990). An award of some sort of injunctive or monetary relief is required and the mere obtaining of favorable judicial comments does not bring a plaintiff within the definition of prevailing party. Nonetheless, the court in *Hewitt* did not foreclose all claims despite the absence of a formal judgment when the suit provides the plaintiff with some or all of the relief sought. The touchstone

of whether the party has prevailed is whether as a result of the plaintiff's lawsuit, there is a material alteration of the legal relationship of the parties which Congress sought to promote in the fee statute caused by the litigation. *Texas State Teacher's Association v. Garland Independent School District,* 489 U.S. 782 (1989).

The trial court, in its finding of fact, held that Taxpayers' Section 1983 action materially altered the legal relationship between the parties for three basic reasons, it found the Commonwealth:

> • in July, 1988, adopted Taxpayers' position and agreed not to tax manufacturers rebates received prior to the sale; (Findings of Fact 1a, 1b, 2a).
>
> • agreed to pay cash refunds for those individuals who filed a claim for refunds from the state; (Findings of Fact 2c, 2e).
>
> • the class was certified, and as a result of the required class notice, individuals received notice that they were entitled to refunds on sales tax paid on rebates. (Findings of Fact 1d, 2b, 2d, 2e).

None of those findings justify the award either because they are not supported by substantial evidence or do not represent a material change in the legal relationship between the parties.

As to the change in the Department's policy not to tax rebates, the policy that Taxpayers sought to change was changed,

but it was changed on April 28, 1988, three weeks before Taxpayers filed their Section 1983 action. The uncontroverted testimony of the Department's Deputy Secretary was that the policy announced was the result of ongoing discussions with the PAA and not the result of Taxpayers' conduct. Moreover, just because the Commonwealth agreed when class notice was sent out that the Commonwealth would not tax rebates and that refunds were available, does nothing to change the legal relationship between the parties. It was a remedy that was already available to Taxpayers. A Section 1983 lawsuit that results in the plaintiff doing no more than it already had committed to do will never satisfy the requirement that the litigation caused the benefit. *See Disabled in Action of Pennsylvania v. Pierce,* 789 F.2d 1016, 1019 (3rd Cir. 1986).

As to the trial court's finding that Taxpayers' Section 1983 action caused refunds to be issued, it is not factually supported in that the Department had previously agreed that its policy was not proper and had already begun to issue refunds. Even if the Department had not begun issuing refunds, *Will* precludes the maintaining of a Section 1983 action for compensatory damages or awarding any type of retroactive relief, including the obtaining of tax refunds.

Finally, just because Taxpayers were successful in having the class certified and in sending class certification notices that there was an administrative process by which refunds would be made to those who paid taxes on rebates, that is not the type of success needed for a plaintiff to be awarded Section 1988 counsel fees. When the class notice was sent, the Commonwealth's policy had already changed and refunds were already being issued. In *Hanrahan v. Hampton,* 446 U.S. 754 (1980), the Supreme Court made it clear that the plaintiff needs to prevail on the merits of his

or her claim to be entitled to counsel fees. It held that success on "procedural or evidentiary rulings which may effect the disposition on the merits, but were themselves not matters on which a party could 'prevail' " and be entitled to Section 1988 counsel fees. *Id.* at 759. Under *Hanrahan,* counsel fees may not be awarded for class certification and notice because that is only a procedural victory, even though it may have the effect of informing the class that relief may be available. *See Society for Good Will to Retarded Children, Inc. v. Cuomo,* 737 F.2d 1253, 1254 (2nd Cir. N.Y. 1984); *see also N.A.A.C.P. v. Wilmington Medical Center, Inc.,* 689 F.2d 1161, 1165-66 (3rd Cir. 1982).

For the above reasons, I concur with the majority in reversing the trial court and denying Taxpayers' claim for counsel fees under Section 1988.

s/ Dan Pellegrini
DAN PELLEGRINI, JUDGE

APPENDIX D — AMENDED OPINION AND DECREE OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY DATED FEBRUARY 2, 1993

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY

CIVIL ACTION - LAW AND EQUITY

NO. 88-3983-17-5

KIM M. VERRICHIA, et al

V.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF REVENUE et al

AMENDED OPINION AND DECREE

Opinion

As of January 11, 1993, when this Court handed down its Decree, the Court was under the impression that the Commonwealth had not filed requests for Findings of Fact and Conclusions of Law. Subsequent to January, 11, 1993, the Court learned for the first time that the Commonwealth did file its requests on July 14, 1992, with the Office of the Prothonotary of Bucks County. However, that office never forwarded the Requests to the undersigned. Also, the Commonwealth never afforded the Court with a courtesy copy of their requests as is usually done in most cases.

In any event, the Court has now had an opportunity to study the Commonwealth's requests and their memorandum of law. Having done so, the Court remains of the opinion that the

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Findings of Fact and Conclusions of Law it has heretofore filed shall remain the same, as shall its Decree. The Decree should now be known as an Amended Decree. However, the Amended Decree also disposes of the Commonwealth's Post Trial Motions, recently filed. Incorporated into this Opinion are the Court's Findings of Fact and Conclusions of Law of January 11, 1993. In addition, the Court's Order of April 1, 1991, dismissing Commonwealth's Motion for Judgment on the Pleadings is incorporated into this opinion.

Discussion

The Court does not believe *Will v. Michigan*, __ U.S. __, 109 S. Ct. 2304 (1989) governs this case.

The Court further incorporates into its order of November 12, 1990 dismissing Commonwealth's Preliminary Objections in which they tried to raise the issue of lack of jurisdiction. The Court likewise does not believe *Greenwich Tp. v. Murtagh*, __ Pa. Comm. Ct. __, 601 A.2d 1352 (1992) governs this case. The Court also stands by its class certification order of February 25, 1991.

As to fees awarded by the Court on January 11, 1993, we conclude that the case of *City of Burlington v. Dague*, __ U.S. __, 112 S. Ct. 2638 (1992) does not control our case.

Amended Decree

Therefore, this 2nd day of February, 1993, this Court modifies its Decree of January 11, 1993, only to the extent that this Court dismisses the Commonwealth's Post Trial motions referred to above. This Court's Decree of January 11, 1993, along

with its Findings of Fact and Conclusions of Law shall otherwise remain the same, along with the above Discussion.

BY THE COURT,

s/ Ward F. Clark
Ward F. Clark, J.

Appendix D

IN THE THE COURT OF COMMON PLEAS OF
BUCKS COUNTY

CIVIL ACTION - LAW AND EQUITY

NO. 88-3983-17-5

KIM M. VERRICHIA, et al

V.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF REVENUE et al

DECREE

Decree

AND NOW, this 11th day of January, 1993, after notice and hearings, it is hereby Ordered and Decreed that:

1. Plaintiffs may voluntarily discontinue this class action by filing a praecipe with the Office of the Prothonotary on or after April 1, 1993.

2. The Notice submitted with Plaintiffs' Brief in Support of Motion for Voluntary Discontinuance and Petition of Smolow & Landis for Attorney's Fees, Costs and Expenses as Exhibit "F" is hereby approved ("the Approved Notice").

3. With respect to any notices of class certification which have not yet been mailed with registration renewal applications as described in this court's order of November 1, 1991, the Approved Notice shall be included with those registration renewal applications.

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4. Where notice of class certification has already been mailed with registration renewal applications, the Commonwealth shall mail the Approved Notice with the next annual registration renewal application for those individuals.

5. Plaintiffs shall publish and mail the approved Notice in the same manner as previously approved by the Court in paragraphs 4 and 5 of its Order dated November 1, 1991.

6. The parties are directed to file an appropriate certification that notice has been given in accordance with this Order.

7. Defendants shall promptly pay refunds to class members who submit a proper written request for refund postmarked on or before March 31, 1993, with interest pursuant to 72 PS. §806.1.

8. Attorneys' fees are awarded to the law firm of Smolow & Landis in the amount of $701,088.07, to be paid by Defendants within seventy-five (75) days of the date of this Order.

BY THE COURT,

s/ Ward F. Clark
Ward F. Clark, J.

APPENDIX E — DECREE OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY DATED JANUARY 11, 1993

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY

CIVIL ACTION - LAW AND EQUITY

NO. 88-3983-17-5

KIM M. VERRICHIA, et al

V.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF REVENUE et al

DECREE

On June 17, 1991, the undersigned conducted at hearing and, at the conclusion thereof, certified this case as a class action. The suit dealt with allegations that the Commonwealth of Pennsylvania was unlawfully directing automobile dealers in the Commonwealth to collect excess 6% sales tax on all new motor vehicles sold with manufacturer's rebates. A hearing on the merits took place on June 29, 1992. Both sides were afforded the opportunity to submit requests for findings of fact and conclusions of law. Plaintiffs filed their requests timely. To date, the Defendants have not filed any. Therefore, this Court, having decided this case is overdue for final disposition, makes the following:

Findings of Fact

1. Plaintiffs have been successful in achieving the following relief for all class members:

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(a) Defendants have adopted Plaintiffs' interpretation of the Tax Code, 72 P.S. §7201(g)(1) and Tax Regulation 300, 61 Pa. Code §33.2(d)(2), and are amending Tax Regulation 300 to conform to Plaintiffs' interpretation to provide that rebates received prior to or at the time of sale should be deducted from the purchase price before calculating and collecting sales tax.

(b) Since July of 1988, Defendants stopped taxing manufacturer's rebates received prior to or at the time of sale. The annual savings to taxpayers in the Commonwealth of Pennsylvania as a result of this change is approximately $15 million per year.

(c) The Plaintiff class has been certified.

(d) Individual notice is being issued to each class member of the certification of this class action, their entitlement to a refund and how to obtain that refund. This notice includes a claim form.

(e) Defendants have agreed to pay cash refunds to individual class members who submit a request for refund postmarked on or before March 31, 1993, plus interest calculated pursuant to 72 P.S. §806.1. Defendants have thus far received approximately 20,971 claims requesting refunds of approximately $943,695.00.

(f) There are approximately 350,000 individual class members for each of the two years included in the class definition, or a total of 700,000 class members. The average amount of excess sales tax collected is $45.00 per class member. The estimated common fund generated as a result of Plaintiffs' efforts and which is available for distribution to eligible class members is approximately $31.5 million.

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2. Plaintiffs were the catalyst for obtaining the relief and benefits described in Finding of Fact No. 1 which were obtained as a direct result of Plaintiffs' efforts. For example:

(a) After this case was filed, the Commonwealth continued to insist that these auto rebates were properly taxable. Defendants stopped collecting sales tax on motor vehicle rebates in July 1988, after being requested to do so by Plaintiffs and after this civil rights law suit was filed.

(b) Defendants developed and implemented a more simplified procedure for processing auto rebate refund requests in August of 1988, after being requested by Plaintiffs to do so and after this civil rights case was filed.

(c) Defendants began to issue refunds of excess sales tax to the class in July of 1988, after this civil rights cased was filed.

(d) Defendants did not give widespread, meaningful or individual notice to the class of Defendants' change in policy and practice, an individual's entitlement to a refund, or how to obtain that refund until the Plaintiff Class was certified in this case in June of 1991 and individual notice was issued pursuant to Pennsylvania Rule of Civil Procedure 1712.

(e) Defendants began the process of amending Tax Regulation 300 to reflect Plaintiffs' interpretation in April of 1989, after being requested to do so by Plaintiffs and approximately one year after this civil rights case was filed.

3. The Court finds that the representative Plaintiffs and their counsel were a substantial motivating factor and catalyst in obtaining all of the relief and benefits ultimately achieved.

4. The Court finds that the representative Plaintiffs and their counsel have created a common fund which is estimated to be approximately $31.5 million available for distribution to eligible class members. Attorneys' fees are properly awarded to class counsel pursuant to the common fund doctrine. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 749 (1980); *Pennsylvania Ass'n. of State Mental Hospital Physicians v. State Employees' Retirement Board*, 87 Pa. Commw. 108, 483 A.2d 1003 (1984); 42 Pa. C.S. §2503(8).

5. The Court also finds that the relief obtained and the benefits achieved, as described in Findings of Fact Nos. 1-4, were part of a de facto settlement between Plaintiffs and Defendants wherein Defendants agreed to pay refunds, plus interest, to class members who submit a timely claim form in accordance with the Notice of Class Action Settlement that was negotiated and agreed to by the parties.

6. The Court further finds, based on the evidence and testimony in this matter, that Defendants are estopped from denying the existence of this agreement resulting from Plaintiffs' efforts, and that Plaintiffs justifiably relied on Defendants' promise and representation to pay these refunds. *Carpenter and Carpenter v. City of Johnstown*, 605 A.2d 456 (Pa. Commw. 1992); *Foster v. Westmoreland Casualty Co.*, 604 A.2d 1131 (Pa. Commw. 1992).

7. Class counsel incurred $39,611.02 in costs and expenses litigating this case. These charges are fair and reasonable and were necessarily incurred. Class Counsel's estimate of $27,477.05 in future litigation costs and expenses to be incurred is also fair, reasonable and necessary to the continued pursuit and completion of this case. A special witness fee of $3,000.00 for the representative Plaintiff, Kim Verrichia, is appropriate.

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8. The Court finds that, pursuant to the common fund doctrine, class counsel are entitled to a reasonable fee of $701,880.00 and reimbursement of costs of $70,088.07. This fee is a reasonable percentage of the fund and benefit conferred. The balance of the common fund shall be available to pay class members who submit a written request for refund post marked on or before March 31, 1993, with interest pursuant to 72. P.A. §806.1.

9. If analyzed under a lodestar approach, the requested fee is reasonable considering the following:

(a) The results and benefits obtained in this case are fair, adequate and reasonable when considered light of the substantial relief obtained, the risks of establishing liability and damages, the complexity, expense and duration of litigation, the reaction of the class and other factors outlined in Pennsylvania Rule of Civil Procedure 1716, *Fisher v. Madway*, 336 Pa. Super. 289, 485 A.2d 809 (1984) and *Buckman v. Century Federal Savings & Loan Ass'n.*, 259 Pa. Super. 37, 393 A.2d 704 (1978).

(b) The reaction of class members to the results obtained by the representative Plaintiffs and their counsel has been uniformly positive.

(c) Class counsel achieved this significant and substantial relief and benefit without undue time and effort, and with a limited amount of judicial intervention.

(d) Class counsel were retained with the only expectation of payment being dependent upon the success of this case and from the common fund, if any, generated as a result of class counsel's efforts, or such amount as awarded by the Court

pursuant to 42 U.S.C. §1988. Class counsel undertook a significant risk contingent upon success.

(e) Class counsel expended 923.8 hours through March 31, 1992 in this law suit in pursuit of these claims, and 922.7 hours in other related litigation which directly benefited this lawsuit and the relief obtained. Class counsel's efforts in this case and the related litigation were reasonable and necessary for Plaintiffs to obtain the relief which they ultimately obtained in this action. Class counsel's estimate of 250 hours for future time necessary to conclude this class action is also reasonable and necessary.

(f) Class counsel's hourly rates are fair and reasonable, adequately reflect counsel's extensive experience as class action litigators and are commensurate with the high quality of work performed. These hourly rates are also commensurate with the hourly rates charged by other experience class action litigators in the Philadelphia metropolitan area which range between $150.00 and $350.00 per hour.

(g) The Court finds that class counsel have appropriately adjusted the total number of hours for which they seek compensation based on their limited success on the merits in other related litigation. The Court adopts the adjustment to class counsel's time as described in the Summary of Exhibit "J" to Plaintiffs' Brief and finds that the lodestar for awarding attorneys' fees to class counsel is $350,940.00.

(h) Class counsel should be appropriately compensated for the substantial results obtained, the contingent nature of success, the delay in payment and the efficiency and economy of their efforts in obtaining these results.

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(i) A multiplier to increase the lodestar is warranted in light of the significant and substantial results obtained without an undue amount of time and with limited judicial intervention, the contingent nature of succeeding, the preclusion of other employment, and the substantial delay in payment. The multiplied awarded by the Court is 2.0.

10. The Court finds that class counsel are entitled to a reasonable fee of $701,880.00 and reimbursement of costs of $70,088.07.

11. To the extent that any of these Findings of Fact may be deemed to be Conclusions of Law, they are hereby adopted by the Court.

Conclusions of Law

1. A common fund estimated to be approximately $31.5 million dollars was created as a result of the efforts of the representative plaintiffs and their counsel.

2. The representative plaintiffs were the catalyst for obtaining all of the relief and benefits achieved in this case which were obtained as a direct result of their efforts.

3. The Court also finds that the relief obtained and benefits achieved by Plaintiffs were part of a de facto settlement. Defendants are estopped from denying the existence of this agreement. Plaintiffs' justifiably relied on Defendants' promise and representation to pay refunds plus interest to class members.

4. The filing of this class action, and the filing of the class action claims in *Smolow v. Commonwealth of Pennsylvania*, No.

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603 C.D. 1988 (Commw. Ct.), *Verrichia v. Commonwealth of Pennsylvania*, No. 995 C.D. 1988 (Commw. Ct.), and *Smolow v. Commonwealth of Pennsylvania*, No. 2663 C.D. 1988 (Commw. Ct.), tolled the statute of limitations for all class members from at least May 17, 1986 to the present. The right of class members to submit an individual claim for refund is not barred by the statute of limitations.

5. Pursuant to the common fund doctrine, class counsel are awarded a reasonable attorney's fee of $701,880.00 and reimbursement of $70,088.07 in costs and expenses.

6. In the alternative, class counsel are awarded a reasonable attorney's fee of $701,880.00 and reimbursement of $70,088.07 in costs and expenses pursuant to 42 U.S.C. §1988.

7. The voluntary discontinuance of this class action, and the proposed notice thereof, are hereby approved. An appropriate order follows.

8. To the extent any of these Conclusions of Law may be deemed Findings of Fact, they are hereby adopted by the Court.

Decree

AND NOW, this day of January, 1993, after notice and hearings, it is hereby Ordered and Decreed that:

1. Plaintiffs may voluntarily discontinue this class action by filing a praecipe with the Office of the Prothonotary on or after April 1, 1993.

2. The Notice submitted with Plaintiffs' Brief in Support of

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Motion for Voluntary Discontinuance and Petition of Smolow & Landis for Attorney's Fees, Costs and Expenses as Exhibit "F" is hereby approved ("the Approved Notice").

3. With respect to any notices of class certification which have not yet been mailed with registration renewal applications as described in this court's order of November 1, 1991, the Approved Notice shall be included with those registration renewal applications.

4. Where notice of class certification has already been mailed with registration renewal applications, the Commonwealth shall mail the Approved Notice with the next annual registration renewal application for those individuals.

5. Plaintiffs shall publish and mail the approved Notice in the same manner as previously approved by the Court in paragraphs 4 and 5 of its Order dated November 1, 1991.

6. The parties are directed to file an appropriate certification that notice has been given in accordance with this Order.

7. Defendants shall promptly pay refunds to class members who submit a proper written request for refund postmarked on or before March 31, 1993, with interest pursuant to 72 PS.§ 806.1.

8. Attorneys' fees are awarded to the law firm of Smolow & Landis in the amount of $701,088.07, to be paid by Defendants within seventy-five (75) days of the date of this Order.

BY THE COURT,

s/ Ward F. Clark
Ward F. Clark, J.